BEFORE THE

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

Rulemaking to Consider Possible Corrections and Changes in Rules in Chapter 480-07 WAC, Relating to Procedural Rules	DOCKET NO. A-050802 COMMENTS OF PUGET SOUND ENERGY, INC.

I. INTRODUCTION

1. Puget Sound Energy, Inc. ("PSE") respectfully submits the following comments in response to the Commission's Notice of Opportunity to File Written Comments in this Docket dated July 20, 2005.

2. PSE's representative for purposes of this proceeding is:

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II. COMMENTS

A. Comments on June 30, 2005 Memorandum to File from Judge Dennis Moss

3. PSE supports many of the suggested changes set forth in the Memorandum to File from Judge Dennis Moss dated June 30, 2005, entitled "Rulemaking – chapter 480-07 WAC-Procedure: 2005 Tune-up Status Report" ("Memo"). PSE's objections to or additional comments regarding specific suggestions in the Memo are set forth below.

Part I: General Provisions

4. **WAC 480-07-160 – Confidential Information:** The first bullet on Memo page 4, which references subsections (2)(a) and (2)(b), appears to have a typo, as WAC 480-07-160(2) does not contain any reference to highlighting colors. The appropriate reference may be to WAC 480-07-160(3)(c). PSE suggests that the sentence that references "contrasting highlighter" be expanded to include "or other marking showing the material on the unredacted page that is designated confidential or highly confidential." For example, PSE has found that outlining the confidential material in a box or italicizing the confidential material sometimes works better than highlighting to preserve legibility in copied or scanned versions of confidential documents.

5. The third bullet on Memo page 4 raises the issue of cross references between WAC 480-07-160, WAC 480-07-420, and WAC 480-07-423. PSE notes that in making an initial filing such as in rate cases, companies often must file confidential or highly confidential information. By necessity, that material is designated confidential pursuant to WAC 480-07-160. Typically, a protective order is then entered shortly after the initial filing.

6. It would be helpful, for clarity, to indicate in the procedural rules and in protective orders issued pursuant to WAC 480-07-420 and WAC 480-07-423 that the terms

of the protective order apply as well to material in the docket that was designated confidential pursuant to WAC 480-07-160 prior to entry of the protective order, without the need to remark and resubmit such materials to include specific reference to the protective order.

Part II: Rule-Making Proceedings

7. PSE does not believe that Part II of the existing rules needs revision. However, in conducting rulemakings, PSE requests that the Commission Staff responsible for rulemakings seek to provide, on a more consistent basis, information about proposed revisions to existing rules. In particular, it would be helpful if: (i) proposed revisions were blacklined or otherwise identified to show all proposed changes to current rules, and (ii) a brief explanation were provided of the reason(s) for each proposed change.

8. When a rulemaking goes through one or more rounds of informal comment, it would also be helpful if Staff would provide some explanation of the reasons it is accepting, rejecting or modifying proposals set forth in the various comments. Among other things, this would likely streamline future rounds of comments, alert interested persons to the existence of any misunderstandings regarding a proposal that has been rejected, and assist all parties in creatively addressing fundamental interests that may be at issue in a rulemaking.

Part III: Adjudicative Proceedings

9. **WAC 480-07-400 – Discovery from Staff:** This rule should *not* be revised to prevent a party from seeking discovery from Staff or from Public Counsel or other intervenors until they file their testimony and exhibits in a case. As PSE pointed out in the procedural rulemaking that led to dropping the original prohibition, such a rule would be particularly inappropriate in an adjudicative proceeding that has been commenced against a company at the request of Staff or another entity based on factual allegations stated in a

complaint or memorandum to the Commissioners. In such a case, the complaining party should be expected to have to answer data requests about the bases for such allegations, facts or analyses supporting any claim of harm or any relief requested, etc.

10. Such a prohibition should also not be established with respect to proceedings such as rate cases or other company filings. As a practical matter, parties rarely seek discovery from Staff, Public Counsel or intervenors until they have completed their analyses and filed testimony and exhibits in such cases. Even if data requests were issued prior to that point, the responding party retains the ability to answer that they have not yet completed their analysis. In some cases, requests for factual information, historical documentation, or other materials might be perfectly appropriate prior to the filing of Staff or intervenor testimonies, and could be important to a company having adequate time to prepare its case. Disputes about such matters should be left to discovery practice – objections and motions to compel -- in individual cases.

11. PSE also does not believe that "black out" periods should be established through a blanket rule, except for a prohibition on discovery among the parties during hearing. In PSE's experience, the parties tend to discover that they have a need for limited additional information during the course of hearing preparation. The existing rules already protect parties from unduly burdensome discovery. Discovery requests that would interfere in a parties' ability to prepare its case could be addressed as needed through existing processes.

12. It *would* be very helpful to limit by general rule promulgation of discovery during hearings, when parties are typically away from their offices for several days attending the hearings. Disputes regarding the availability of information at that time can be addressed

by the hearing officer as part of the hearing process such as through bench requests or records requisitions.

13. **WAC 480-07-420 – Discovery – Protective Orders:** It would be good to clarify that support staff must sign a confidentiality agreement. Doing so would serve as a reminder of the importance of confidentiality restrictions and an opportunity to ensure that support staff understand the terms of a particular protectiver order, since terms can differ from case to case. The standard protective order seems the more appropriate place to do so than the procedural rules because the rules do not address specifics regarding access to information and handling of confidential information in a particular case.

14. **WAC 480-07-460(2)(d) – Form of testimony and exhibits:** With respect to the proposal to add font requirements, PSE notes that exhibits often consist of materials that do not lend themselves well to such a requirement. Examples include photocopies of published articles, spreadsheets that have been reduced to fit an 8 ½ x 11 page, graphs or charts, etc.

15. **WAC 480-07-470(11) – "subject to check" practice:** PSE supports the limits in the current rules on this practice. Questions stated "subject to check" should not be used as a substitute for referring a witness to a document or exhibit, or in order to avoid pre-distribution of cross examination exhibits, or as a means of getting information into the record that a party has failed to submit as part of its case.

16. **WAC 480-07-510(3)(b) – GRC filing requirements:** It would be helpful to add the proposed requirement that each adjustment offered by any party be accompanied by a full explanation in testimony and exhibits or workpapers. Similarly, it would be helpful and would streamline the process to require all parties to provide workpapers to other parties along with their pre-filed testimony and exhibits, just as companies are required to do with

their initial rate case filings. Such requirements should probably be organized into a new subsection (8), since subsections (1) through (7) set forth what "the company must provide" in its initial general rate case filing.

17. **WAC 480-07-730 – Settlement:** PSE would support changing the term "multiparty settlement" to "multiparty stipulation" in subsection (3). The current rule permits parties opposed to such a stipulation to "offer evidence and argument in opposition", which permits appropriate procedures to be ordered on a case by case basis. As an example, disagreement on a single issue or on a legal point might require less time and less extensive procedures to present to the Commissioners and hearing officer than disagreement across a large number of factual issues.

18. **Hearing Transcripts:** PSE supports adding a rule providing that parties may make a motion to correct hearing transcripts, but need not do so for readily identifiable typographical errors or errors that are not material to the issues in dispute. Proceedings before the Commission often include technical terms or terms of art with which court reporters are not familiar. It is not uncommon for transcripts to contain errors such that all parties would agree that the official transcript is *not* an accurate record of what was said and heard by everyone in the hearing room.

19. Yet, the transcript is what is cited in briefs and the Commission's orders and any appeal therefrom, as well as in future Commission proceedings that may involve persons who were not in the hearing room or who are less familiar with the terms or issues in dispute at the time. Indeed, because Commission proceedings involve the same regulated companies and potentially similar issues over time, errors that may exist in transcripts filed in Commission proceedings arguably are potentially more harmful to the parties and public than errors in transcripts in civil cases.

20. Taken all together, it would appear to be better practice to correct the record and address any disputes regarding such corrections very shortly after the hearing rather than leaving substantive errors in the record. PSE submits that in most cases, proposed corrections would not be controversial. In that regard, PSE has in mind corrections regarding what was actually said in a question or answer, not what someone "meant to say." Explanations or changes to testimony should be addressed only through a motion to reopen the record and not to correct a transcript.

21. To the extent the Commission looks to civil rules in considering this matter, PSE notes that the Federal Rules of Appellate Procedure provide: "If any difference arises about whether the record truly discloses what occurred in the district court, the difference must be submitted to and settled by that court and the record confirmed accordingly." FRAP 10(e)(1). Both the district court and court of appeals are empowered to correct the record "[i]f anything material to either party is omitted from or misstated in the record by error or accident." FRAP 10(e)(2).

B. Additional Proposed Revision

22. PSE requests that the Commission and interested persons consider the following additional concerns regarding the existing procedural rules.

23. **WAC 480-07-423 – Discovery – Protective Orders:** The current rules state that "Designation of documents as highly confidential is not permitted under the commission's standard form of protective order, and may only occur if the commission so orders." Yet **WAC 480-07-423(1)(b)** states that "A party that wishes to designate information as highly confidential must first *file a motion* for an amendment to the standard protective order...." (Emphasis added). PSE understands the reasons the Commission requires parties to file a motion for an amendment to the standard protective order if its wishes to designate

documents as "highly confidential" and is not concerned about that requirement. However, PSE believes that the rules should be clarified to remove any suggestion that there is a prohibition on such designations until the Commission actually issues a "highly confidential" protective order.

24. There are circumstances in which it serves the interests of the Commission and all parties for a party to designate material as "highly confidential" while awaiting Commission action on an order for highly confidential protective order. For example, in PSE's 2005 power cost only rate case, Docket No. UE-050870, PSE filed a motion for "highly confidential" protective order along with its initial filing in the case. PSE also filed with the Commission at that time a complete initial filing, including a number of pages designated as "Highly Confidential per WAC 480-07-160." PSE's motion did not seek to restrict Commission Staff or Public Counsel employees (but not their outside consultants) from reviewing such material.

25. By proceeding in this manner, PSE permitted Commission Staff and Public Counsel to immediately begin reviewing the complete filing, including all prefiled testimony and exhibits. Although intervenors and Public Counsel's external expert received redacted versions of the filing, they were thereby in a position to see exactly where in the filing PSE had designated material as "highly confidential" and the related context. No Commission order has yet issued granting or denying PSE's motion because the parties have been able to resolve all disputes to date regarding access to specific highly confidential information in that case, while agreeing to disagree about fundamental issues of principle related designation of "highly confidential" materials.

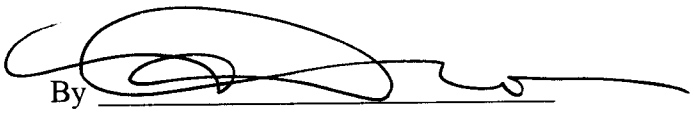
26. **WAC 480-07-460(1)(b)(iii) – Changes or corrections to prefiled materials:** The current rule provides that "revised portions must be highlighted, in legislative

style or other manner that clearly indicates the change from the original submission." PSE generally supports the continuation of a requirement to bring revisions in prefiled testimony or exhibits to the attention of other parties. However, PSE has encountered difficulties in meeting this requirement when applied to accounting spreadsheets that roll up information from other spreadsheets. It can take hours to individually mark each figure that is changed as an underlying number flows through the various accounting spreadsheets. Such marking can be difficult or impossible due to spreadsheet formatting and the requirement to submit both electronic and paper versions of exhibits.

27. PSE would like the Commission and interested parties to consider revising this rule to permit a party to show a revision in the testimony and on the first exhibit page that addresses the substance of the item at issue, but that does not require revisions to be marked in subsequent spreadsheets that use that number and roll the revised number through various other calculations.

DATED: August 26, 2005.

PERKINS COIE LLP



By _____
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